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# State v. Bonner Appellant's Brief Dckt. 43748

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	NO. 43748
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY NO. CR 2014-20792
v.	)	
	)	
LEO PHILIP BONNER,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

**BRIEF OF APPELLANT**

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI**

**HONORABLE CYNTHIA K. C. MEYER  
District Judge**

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## STATEMENT OF THE CASE

### Nature of the Case

Pursuant to a conditional plea agreement following the denial of his motion to suppress, Leo Philip Bonner pleaded guilty to felony possession of a controlled substance and misdemeanor resisting and/or obstructing law enforcement. The district court imposed a unified sentence of five years, with two years fixed, suspended the sentence, and placed Mr. Bonner on probation for a period of two years. On appeal, Mr. Bonner asserts the district court erred when it denied his motion to suppress.

### Statement of the Facts and Course of Proceedings

The district court, after a hearing on Mr. Bonner's motion to suppress, made the following findings of fact:

[A]t approximately 6:00 p.m. Officer Mortensen of the Coeur d'Alene Police Department conducted a traffic stop<sup>1</sup> of a purple Toyota 4-Runner. According to Officer Mortensen he was familiar with this particular vehicle and it was a known drug vehicle. Officer Mortensen testified that upon making contact with the driver of the vehicle and its occupants, Mark Colandonato [the driver], Jordan McElwain, and Leo Bonner (Defendant), he detected the odor of marijuana and observed a pocket knife in the center console. Officer Mortensen collected the vehicle's occupants' identification information, returned to his vehicle, and requested a backup officer.

Upon the arrival of a backup officer, Officer Mortensen asked Mr. Colandonato and Mr. McElwain to exit the vehicle; both men complied and Officer Mortensen conducted a frisk of each man as he exited. When Mr. Colandonato exited the vehicle, Officer Mortensen observed a 12" long silver metal club type object between the driver's seat and driver's side door. When Officer Mortensen frisked Mr. McElwain he located a small knife on his person.

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<sup>1</sup> Officer Mortensen had seen the 4-Runner turn onto the road from a gas station without coming to a complete stop. (R., p.88.)

After Mr. Colandonato and Mr. McElwain had exited the vehicle, Officer Mortensen asked Mr. Bonner to also exit. Mr. Bonner repeatedly refused, became nervous, and was argumentative. After several refusals, Officer Mortensen reached into the vehicle to grab Mr. Bonner's right arm and only then did Mr. Bonner exit the vehicle. After Mr. Bonner exited the vehicle, Officer Mortensen conducted a frisk of his person; during the frisk Officer Mortensen located a meth pipe in Mr. Bonner's shirt pocket.

After removing the men from the vehicle, Officer Mortensen conducted a search of the vehicle during which he located additional paraphernalia and marijuana. Ultimately Mr. Bonner was placed under arrest for possession of paraphernalia.

(R., pp.104-05 (footnote omitted). See *generally* State's Ex. 2 (copy of the video recording of the traffic stop).) Officer Mortensen took Mr. Bonner to the Kootenai County Public Safety Building, where heroin and methamphetamine were found on Mr. Bonner's person. (See R., p.89.)

The State charged Mr. Bonner by Information with two counts of possession of a controlled substance, felony, in violation of Idaho Code § 37-2732(c)(1), one count of possession of drug paraphernalia, misdemeanor, in violation of I.C. § 37-2734A, and one count of resisting and/or obstructing law enforcement, misdemeanor, in violation of I.C. § 18-705. (See R., pp.54-56.) Mr. Bonner pleaded not guilty. (R., p.61.)

Mr. Bonner filed a Motion to Suppress, based on the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 13 and 17 of the Idaho Constitution. (R., pp.65-66.) The motion to suppress asserted "the State's warrantless search, seizure, and arrest was in violation of the Constitution and laws of the United States and of the State of Idaho." (R., p.65.) The State filed a Memorandum in Opposition to Motion to Suppress. (R., pp.67-82.)

At the motion to suppress hearing, the parties stipulated there was a warrantless arrest. (R., p.82.) Officer Mortensen testified on behalf of the State. (R., pp.82-86;

Tr., Apr. 9, 2015, p.4, L.5 – p.28, L.19.) Mr. Bonner did not call any witnesses on his behalf. (Tr., Apr. 9, 2015, p.28, Ls.22-24.) The parties stipulated to the admission of the video recording of the traffic stop. (R., p.86.)

Following the hearing, Mr. Bonner filed a Memorandum in Support of Motion to Suppress Evidence. (R., pp.88-100.) The memorandum presented two issues: “A. The search should be suppressed because the faint odor of marijuana without more information is not sufficient to search the entire vehicle. And even [i]f probable cause existed to search the vehicle it did not extend to search of the persons”; and “B. The Terry Frisk and subsequent evidence must be suppressed because Officer Mortensen had no articulable suspicion that Mr. Bonner was both armed and presently dangerous to warrant a pat down.” (R., p.88.)<sup>2</sup>

The district court then issued a Memorandum Decision and Order on Defendant’s Motion to Suppress. (R., pp.104-13.) According to the district court, “Officer Mortensen decided to search the vehicle due to the detected odor of marijuana; the Court finds that pursuant to [*State v. Schmadeka*, 136 Idaho 595 (Ct. App. 2001),] a warrantless search of the passenger compartment was lawful because the odor of marijuana gave rise to probable cause.” (R., p.108.) The district court determined that, “[b]ecause the lawful search of the passenger compartment turned up additional contraband . . . Officer Mortensen had probable cause to complete a search of the entire vehicle.” (R., p.109 (citing *State v. Shepherd*, 118 Idaho 121 (Ct. App. 1990).) Thus, the district court found the search of the car was valid pursuant to the automobile exception to the warrant requirement. (R., p.109.)

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<sup>2</sup> See *Terry v. Ohio*, 392 U.S. 1 (1968).

The district court made the following findings of fact with respect to the *Terry* frisk:

Officer Mortensen testified that at the time of the stop it was dark outside and the stop occurred under an overpass. Officer Mortensen also testified that he had had prior contacts with the vehicle, and he can be heard on [the video recording] advising the backup officer that it was a known drug vehicle. Officer Mortensen testified that during his initial contact with the vehicle he observed a pocket knife in the center console; according to Officer Mortensen this knife was within arm's reach of all passengers. Officer Mortensen further testified that when he asked the driver of the vehicle to exit, he observed an approximately 12" long silver colored type metal club on the floor between the driver's seat and door. During a frisk of passenger Jordan McElwain, Officer Mortensen located an additional small knife. After making his initial contact with the vehicle's occupants Officer Mortensen requested a backup officer to respond to the scene.

Furthermore, as to the *Terry* frisk of Mr. Bonner, the Court finds that Mr. Bonner was uncooperative and argumentative with Officer Mortensen when Officer Mortensen requested he exit the vehicle. Officer Mortensen testified that Mr. Bonner's demeanor was extremely nervous. Mr. Bonner repeatedly refused to exit the vehicle, and did not exit until Officer Mortensen reached into the vehicle to grab Mr. Bonner's right arm. According to Officer Mortensen he had officer safety concerns based upon Mr. Bonner's high level of nervousness and noncompliance.

(R., pp.110-11.)

The district found that under the totality of the circumstances "Officer Mortensen reasonably concluded, based on his observations, that Mr. Bonner may have been armed and presently dangerous." (R., p.111.) The district court further found "the observations of the weapons in the vehicle and Mr. Bonner's uncooperative and nervous demeanor, served to further exacerbate Officer Mortensen's concerns for officer safety." (R., p.111.) The district court found "that based on the totality of the circumstances, Officer Mortensen was entitled to conduct a carefully limited search of Mr. Bonner's outer clothing in an attempt to discover weapons which might be used to assault the officers at the scene." (R., p.111.) The district court also found "pursuant to



the plain feel doctrine, Officer Mortensen was justified in conducting a warrantless seizure of the pipe from Mr. Bonner's shirt pocket." (R., p.112.) The district court therefore denied Mr. Bonner's motion to suppress. (R., p.112.)

Pursuant to a conditional plea agreement, Mr. Bonner agreed to plead guilty to one count of possession of a controlled substance, methamphetamine, and one count of resisting and/or obstructing law enforcement. (See R., pp.117-18.) Mr. Bonner also agreed to waive his right to appeal as to conviction. (R., p.118.) The State agreed to a sentencing recommendation not to exceed a rider. (See R., p.118.) Mr. Bonner's plea preserved his right to appeal the denial of his motion to suppress. (R., p.119.) If Mr. Bonner prevailed on appeal, he would be allowed to withdraw his guilty plea. (R., p.119.) The district court accepted Mr. Bonner's guilty plea. (R., p.117.)

For possession of a controlled substance, the district court imposed a unified sentence of five years, with two years fixed, suspended the sentence, and placed Mr. Bonner on supervised probation for a period of two years.<sup>3</sup> (R., pp.145-49.)

Mr. Bonner filed a Notice of Appeal timely from the district court's judgment. (R., pp.153-56.)

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<sup>3</sup> For the resisting and/or obstructing law enforcement count, the district court imposed a sentence of eleven days jail, with credit for eleven days served. (R., p.114.)

## ISSUE

Did the district court err when it denied Mr. Bonner's motion to suppress?

## ARGUMENT

### The District Court Erred When It Denied Mr. Bonner's Motion To Suppress

#### A. Introduction

Mr. Bonner asserts the district court erred when it denied his motion to suppress, because his constitutional right to be free from unreasonable searches and seizures was denied. The *Terry* frisk of Mr. Bonner was not justified, because the facts known to the officer would not have caused a reasonable person to conclude Mr. Bonner was armed and dangerous.

#### B. Standard Of Review And Applicable Law

The standard of review for a motion to suppress is bifurcated. An appellate court defers to the trial court's findings of fact unless the findings are clearly erroneous, and freely reviews the trial court's application of constitutional principles to the facts as found. *State v. Hankey*, 134 Idaho 844, 846 (2000).

The Fourth Amendment to the United States Constitution and Article I, § 17 of the Idaho Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Idaho Const. art. I, § 17. Evidence obtained in violation of these constitutional protections generally may not be used as evidence against the victim of the illegal government action. See *State v. Koivu*, 152 Idaho 511, 518-19 (2012); *State v. Bishop*, 146 Idaho 804, 810-11 (2009). This exclusionary rule "applies to evidence obtained directly from the illegal government action and to evidence discovered through the exploitation of the original illegality, or the fruit of the poisonous tree." *Bishop*, 146 Idaho at 811.

Here, the parties stipulated there was a warrantless arrest of Mr. Bonner. (R., p.82.) “Any warrantless search or seizure of a citizen is presumptively unreasonable unless it falls within certain specific and well-delineated exceptions.” *Halen v. State*, 136 Idaho 829, 833 (2002). “When a warrantless search or seizure is challenged by the defendant, the State bears the burden to show that a recognized exception to the warrant requirement is applicable.” *Id.*

C. The *Terry* Frisk Of Mr. Bonner Was Not Justified, Because The Facts Known To The Officer Would Not Have Caused A Reasonable Person To Conclude Mr. Bonner Was Armed And Dangerous

Mr. Bonner asserts his *Terry* frisk by Officer Mortensen was not justified, because the facts known to the officer would not have caused a reasonable person to conclude Mr. Bonner was armed and dangerous. Generally, a search must be authorized by a warrant that is based on probable cause, unless one of the exceptions to the warrant requirement applies. *Bishop*, 146 Idaho at 818. “One such exception is the pat-down search for weapons acknowledged by the United States Supreme Court in *Terry v. Ohio*, [392 U.S. 1, 27 (1968)].” *Id.* “Under *Terry*, an officer may conduct a limited pat-down search, or frisk, ‘of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons.’” *Id.* (quoting *Terry*, 392 U.S. at 16.)

A *Terry* frisk “is only justified when, at the moment of the frisk, the officer has reason to believe that the individual he or she is investigating is ‘armed and presently dangerous to the officer or others’ and nothing in the initial stages of the encounter dispels the officer’s belief.” *Id.* (quoting *Terry*, 392 U.S. at 24.) “The test is an objective one that asks whether, under the totality of the circumstances, a reasonably prudent person would be justified in concluding that the individual posed a risk of danger.” *Id.*

“To meet this standard, the officer must indicate specific and articulable facts which, taken together with rational inferences from those facts, in light of his or her experience, justify the officer’s suspicion that the individual was armed and dangerous.” *Id.* at 818-19 (internal quotation marks omitted). “Although an officer need not possess absolute certainty that an individual is armed and dangerous, an officer’s inchoate and unparticularized suspicion or hunch is not enough to justify a frisk.” *Id.* at 819 (internal quotation marks omitted).

The Idaho Supreme Court in *Bishop* listed several factors that “influence whether a reasonable person in the officer’s position would conclude that a particular person was armed and dangerous,” including

whether there were any bulges in the suspect’s clothing that resembled a weapon; whether the encounter took place late at night or in a high crime area; and whether the individual made threatening or furtive movements, indicated that he or she possessed a weapon, appeared nervous or agitated, appeared to be under the influence of alcohol or illegal drugs, was unwilling to cooperate, or had a reputation for being dangerous.

*Id.* The Court observed “[w]hether any of these considerations, taken together or by themselves, are enough to justify a *Terry* frisk depends on an analysis of the totality of the circumstances.” *Id.* “For a frisk to be held constitutional, an officer must demonstrate how the facts he or she relied on in conducting the frisk support the conclusion that the suspect posed a risk of danger.” *Id.*

Under the totality of the circumstances here, the facts known to Officer Mortensen would not have caused a reasonable person to conclude Mr. Bonner was armed and dangerous. Although the district court found Mr. Bonner was uncooperative and nervous (see R., pp.110-11), the district court did not find Mr. Bonner made any threatening movements, indicated he possessed a weapon, or had a reputation for

being dangerous. See *Bishop*, 146 Idaho at 819. Mr. Bonner did not have any bulges in his clothing that resembled a weapon, and the incident did not occur late at night or in a high crime area. See *id.* While Officer Mortensen saw a knife and a club in the car and removed a small knife from the person of Mr. McElwain (see R., p.110), those facts did not suggest Mr. Bonner presented a risk of danger to the officer. Cf. *State v. Henage*, 143 Idaho 655, 662 (2007) (indicating a defendant's admission he has a knife does not alone justify a *Terry* frisk because weapon possession, in and of itself, does not necessarily mean that a person poses a risk of danger).

Thus, under the totality of the circumstances, the facts known to Officer Mortensen would not have caused a reasonable person to conclude Mr. Bonner was armed and dangerous. See *Bishop*, 146 Idaho at 819. The officer's *Terry* frisk of Mr. Bonner was not justified. See *id.* at 819-20.

In sum, Officer Mortensen's *Terry* frisk of Mr. Bonner was not justified. Thus, the district court erred when it denied Mr. Bonner's motion to suppress, because his constitutional right to be free from unreasonable searches and seizures was denied.

### CONCLUSION

For the above reasons, Mr. Bonner respectfully requests that this Court vacate the district court's order of judgment and reverse the order which denied his motion to suppress.

DATED this 25<sup>th</sup> day of March, 2016.

\_\_\_\_\_/s/  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25<sup>th</sup> day of March, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

LEO PHILIP BONNER  
1579 EAST DALTON AVE  
DALTON GARDENS ID 83815

CYNTHIA K C MEYER  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

J BRADFORD CHAPMAN  
KOOTENAI COUNTY PUBLIC DEFENDER  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
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E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BPM/eas